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In the Supreme Court of the United States

OCTOBER TERM, 1969

RUTH SNYDER, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1389

RUTH SNYDER, ET AL., PETITIONERS

v.

WALTER J. HICKEL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINION BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. 1a–3a) and the original opinion of the court to which it adhered are reported at 405 F. 2d 1179.

JURISDICTION

The judgment of the court of appeals *en banc*, reaffirming its original judgment, was entered on February 12, 1969. The petition for a writ of certiorari was filed on May 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

353-461—69

QUESTION PRESENTED

Whether the Secretary of the Interior applied the proper standard in determining whether petitioners had made a discovery of a "valuable mineral deposit."

STATUTE INVOLVED

The Act of May 10, 1872, 17 Stat. 91 (now 30 U.S.C. 22), is set forth at Pet. App. 50a.

STATEMENT

After appropriate administrative proceedings, the Secretary of the Interior held (Pet. App. 23a–36a) that petitioners' unpatented lode mining claims were null and void for lack of a discovery of a valuable mineral deposit as of March 30, 1948, the date the lands were withdrawn from location under the mining laws and reserved for the use of the Atomic Energy Commission subject only to valid existing rights (Public Land Order No. 459, March 25, 1948, 13 Fed. Reg. 1763). The validity of the withdrawal order is not challenged.

The district court, upon a review of the administrative record (Pet. App. 4a–15a), set aside the decision of the Hearing Examiner (Pet. App. 37a–49a), which had been affirmed by the Director of the Bureau of Land Management (Pet. App. 16a–22a) and the Secretary of the Interior (Pet. App. 23a–36a), on the ground that the testimony of the government's expert witnesses was based on an erroneous test for determining the existence of a mineral discovery. The district court, in addition, ruled that the government's

expert witnesses had been incompetent to testify for various reasons (Pet. App. 7a) and that, absent their opinions, the evidence was insufficient to support the administrative determination (Pet. App. 9a).

The court of appeals, sitting *en banc,* reversed "on the authority of *United States* v. *Coleman* [390 U.S. 599] * * *" (Pet. App. 2a). The court of appeals held that the Secretary had applied the correct standard in determining that, for want of a valuable mineral deposit, no discovery had been made at the time of the land's withdrawal; that the government witnesses were competent to testify; and that the Secretary's decision was supported by substantial evidence and was not clearly erroneous (Pet. App. 2a–3a). The petition in this Court seeks review of only the first of these rulings.

ARGUMENT

Contrary to petitioners' contention, this case does not present a novel or unresolved issue as to the standard to be applied in determining whether a valuable mineral deposit has been discovered, and there is no conflict between the decision below and that of the court of appeals for the Ninth Circuit in *Converse* v. *Udall,* 399 F. 2d 616, certiorari denied, 393 U.S. 1025. Specifically relying on this Court's ruling in *Coleman, supra,* that "the marketability test" (*i.e.,* whether "the mineral can be 'extracted, removed and marketed at a profit' * * *," 390 U.S. at 600) is merely "a logical complement to the 'prudent-man test' which the Secretary has been using to interpret the mining laws since 1894" (390 U.S. at 602), both

courts of appeals held that the Secretary may apply the marketability test to mining claims for metallic as well as for nonmetallic minerals. Indeed, the court in *Converse* specifically stated that *Coleman* makes "* * * it clear that the marketability test is applicable to all mining claims" (399 F. 2d at 621).

Petitioners complain (Pet. 8–9), however, that the court below failed to recognize the refinements in applying the marketability test that were elaborated in the *Converse* opinion. There was, however, no need in the present case for the court to consider these possible refinements—just as the court found "[o]f no determinative concern in this case * * * refinements of evidentiary problems concerning the extent to which resort may be had to technological aids and inferences in the modern context on the basic issue of mineral discovery as now defined by the Supreme Court" (405 F. 2d at 1180; Pet. App. 3a). The decisive issue in this case was whether petitioners' surface mineralization claims as of the withdrawal date qualify as a discovery of mineral deposits which are structurally unconnected with the surface and which were found by drilling to a depth of 201 feet ten years after the lands had been withdrawn from location under the mining laws (see Pet. App. 18a–19a, 29a–30a). The Secretary correctly ruled that the facts known on the withdrawal date are controlling, and that ruling is not challenged in this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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